

## Navigating the Changing Landscape of Law Enforcement Liability

Michael F. Iasparro and Vincent M. Rizzo  
Hinshaw & Culbertson LLP



© 2022 Hinshaw & Culbertson LLP

## Meet the Presenters



**Michael Iasparro** focuses his practice on complex litigation and internal investigations. Mr. Iasparro has served as lead counsel in more than 25 jury trials and has conducted hundreds of depositions of lay and expert witnesses. Previously, he served for more than six years as an assistant United States attorney for the Northern District of Illinois.



**Vincent Rizzo** is licensed in California and Illinois, with extensive experience defending entities and employees against claims involving Section 1983 and Monell. He has successfully tried numerous civil jury trials to defense verdict, and obtained multiple summary judgments. Prior to Hinshaw, he was an Assistant Corporation Counsel for the City of Chicago, representing the City and police officers in police misconduct cases.

## Hinshaw & Culbertson

- ❖ U.S. based law firm headquartered in Chicago, with 23 offices nationwide (11 states) and in London
- ❖ 400+ attorneys
- ❖ Founded in 1934
- ❖ Am Law ranked

© 2022 Hinshaw & Culbertson LLP



## Individual Liability Under Section 1983

© 2022 Hinshaw & Culbertson LLP

## Section 1983 is a Vehicle to Federal Court

- ❖ "Every **person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia**, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the **deprivation of any rights, privileges, or immunities secured by the Constitution and laws**, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress..."

42 U.S.C. § 1983 – Civil action for deprivation of rights protected by federal law

© 2022 Hinshaw & Culbertson LLP



## Section 1983 Basics

- ❖ Does not create any rights in and of itself. Rather, Section 1983 provides the basis for liability, and authority to sue, for the deprivation of federal Constitutional, statutory and/or other rights where:
  - The conduct causing the deprivation was under color of state, territorial, or municipal law (or some other non-federal political subdivision), i.e., engaged in based on lawful authority. Caveat: outside the lawful scope (e.g., sexual harassment).
  - The deprivation was of a right, privilege or immunity secured by federal law.

© 2022 Hinshaw & Culbertson LLP



## Every “person” ... shall be liable?

- ❖ Individual liability statute unless some basis for entity (e.g., municipal) liability – see *Monell*.
- ❖ Every person who “subjects, or causes to be subjected...”
  - Failure to Intervene
  - Conspiracy
  - Supervisory liability (not vicarious)
    - But only if there is some underlying violation.

© 2022 Hinshaw &amp; Culbertson LLP

HINSHAW

Squad 283 - PDRC18024  
Frank - Fabiani  
06/27/2020 23:16:45



© 2022 Hinshaw &amp; Culbertson LLP

HINSHAW



© 2022 Hinshaw &amp; Culbertson LLP

HINSHAW

## Excessive Force Cases

- ❖ Plaintiff's bar taking advantage of the tenor of the day
- ❖ More cases getting filed
- ❖ Borderline cases more likely to get filed
- ❖ What remains the same:
  - Legal Standard
  - Qualified Immunity

© 2022 Hinshaw &amp; Culbertson LLP

HINSHAW

## Reasonableness Standard

- ❖ Whether an officer has used excessive force depends on “the facts and circumstances of each particular case, including “the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he actively is resisting arrest or attempting to evade arrest by flight.”

*Graham v. Connor*, 480 U.S. 386, 396 (1989)

*Thompson v. City of Chicago*, 472 F.3d 444, 454 (7<sup>th</sup> Cir. 2006); *Abdullahi v. City of Madison*, 423 F.3d 763, 768 (7<sup>th</sup> Cir. 2005)

- ❖ The determination of reasonableness must be judged **from the perspective of a reasonable officer** on the scene AND must account for the fact that police officers often have to make split-second judgments.

© 2022 Hinshaw &amp; Culbertson LLP

HINSHAW

## Qualified Immunity

- ❖ Progressive buzz saw
- ❖ Despite reformists' mantra to do away with the doctrine, it is alive and well
- ❖ Doctrine judicially established by the Supreme Court over 50 years ago
- ❖ Distinguish federal qualified immunity versus state qualified immunity

© 2022 Hinshaw &amp; Culbertson LLP

HINSHAW

## Two Questions for Qualified Immunity under Federal Law in Excessive Force Cases

- ❖ First, whether the evidence shows or could convince a jury that the officers used excessive force in violation of the 4<sup>th</sup> Amendment.
  - If yes, move to question 2.
  - If no, case over – police win.
- ❖ Second, whether the officers should have known they were breaking “clearly established law.”
  - If yes, set for trial.
  - If no, qualified immunity.

© 2022 Hinshaw &amp; Culbertson LLP

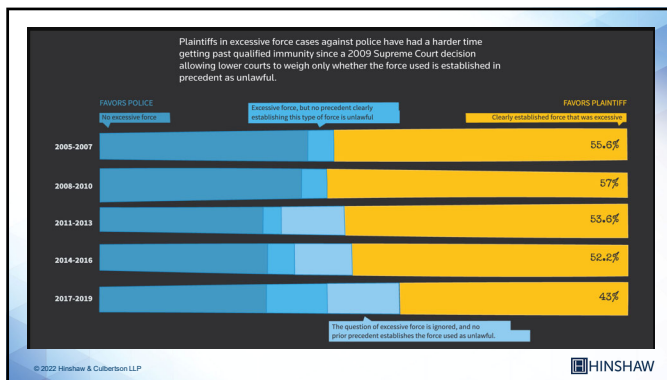
HINSHAW

## Reuters Study 2020

- ❖ Analyzed 252 excessive force cases where the two-part test was applied - in more than 50% of the cases, courts granted immunity to the defendant officers.
- ❖ Study also compared cases from two periods: 2005-2007 and 2017-2019.
  - 2005-2007: 44% favored police / 56% favored plaintiffs
  - 2017-2019: 57% favored police / 43% favored plaintiffs
- ❖ Since 2009, the Supreme Court has allowed lower courts to skip the first step and go right to the second. Lower courts have increasingly chosen to do so.

© 2022 Hinshaw &amp; Culbertson LLP

HINSHAW



© 2022 Hinshaw &amp; Culbertson LLP

HINSHAW

## What's the takeaway?

- ❖ Reuters study was pre-George Floyd, no more recent study to consider the impact of the movement that event prompted.
- ❖ One important factor between 2005-2007 and 2017-2019 is the proliferation of body and dash cam video footage and cell phone video footage of citizen/police encounters.
- ❖ May seem counterintuitive, and there was much resistance from law enforcement and police unions in particular to body cams specifically.

© 2022 Hinshaw &amp; Culbertson LLP

HINSHAW

## Impact of Body, Dash and Cell Phone Video and Audio

- ❖ While the egregious and outlier cases with such video footage often make the nightly news, it is not unreasonable to conclude that video footage of police/citizen encounters where force is used, and excessive force is claimed, has been a substantial factor in the uptick of grants of qualified immunity.
  - Before: issues of material fact were based on disputed testimony, not illustrated by any video or audio evidence.
  - Now: such evidence often disposes of genuine issues of material fact.
- ❖ We argue that police body and dash cam video and the proliferation of cell phone video footage has actually been a good thing for police liability cases.

© 2022 Hinshaw &amp; Culbertson LLP

HINSHAW

## *Ancheta v. Winnebago County, et al.*

- ❖ Pending case, U.S. District Court, Northern District of Illinois
- ❖ Wanted felon
- ❖ Police shootout in broad daylight at a busy gas station / convenience store
- ❖ Ancheta convicted of state charge, 27 year sentence
- ❖ 6 deputies sued as well as Sheriff and County of Winnebago

© 2022 Hinshaw &amp; Culbertson LLP

HINSHAW

## Wainer Sousa Ancheta Videos

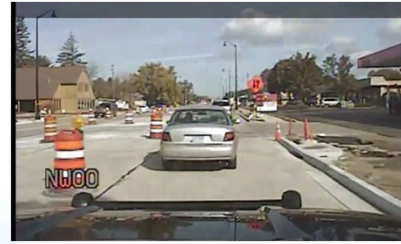
Real-time from Convenience Store View



© 2022 Hinshaw & Culbertson LLP

HINSHAW

## Ancheta Video Slo-Mo, Deputy Dashcam



© 2022 Hinshaw & Culbertson LLP

HINSHAW

## Qualified Immunity Stronger Than Ever

- ❖ Since the Reuters study, the Supreme Court has only strengthened the doctrine.
- ❖ *Rivas-Villegas v. Cortesluna* and *City of Tahlequah, Oklahoma v. Bond* (Oct. 18, 2021) - Per Curiam
  - Court reiterated: “Qualified immunity attaches when an official’s conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Cortesluna*
  - A right is clearly established when it is “sufficiently clear that every reasonable official would have understood that what he is doing violates that right.”

© 2022 Hinshaw & Culbertson LLP

HINSHAW

## 2021 U.S. Supreme Court Qualified Immunity Decisions

- ❖ In the 4<sup>th</sup> Amendment context in particular, whether a right has been clearly established is context and fact specific.
- ❖ In *Cortesluna*, the plaintiff claimed excessive force when an officer put a knee on his back while the plaintiff was being taken into custody and the officer was attempting to remove a knife from the plaintiff’s pocket as the plaintiff lay prone on the ground.
- ❖ Court said that to show a violation of a clearly established law, *Cortesluna* needed to identify a case that put the officer on notice that his specific conduct was unlawful.

© 2022 Hinshaw & Culbertson LLP

HINSHAW

## *Cortesluna*, cont.

- ❖ Plaintiff was unable to identify any case that put the officer on notice that his actions were unlawful, and therefore qualified immunity was appropriate.
- ❖ Important to the Court’s analysis was video evidence which showed that the officer put his knee on the plaintiff’s back for no more than 8 seconds, and only on the side of his back near the knife that officers were in the process of retrieving.

© 2022 Hinshaw & Culbertson LLP

HINSHAW

## *City of Tahlequah, Oklahoma v. Bond*

- ❖ Wrongful death / Excessive Force case.
- ❖ During a conversation between the police and decedent, he became agitated, grabbed a hammer, raised it as if about to swing or throw it in the direction of officers. Officers fired, killing him.
- ❖ Captured on police body cam video.

© 2022 Hinshaw & Culbertson LLP

HINSHAW

### City of Tahlequah, cont.

- ❖ Court said, “We need not, and do not, decide whether the officers violated the Fourth Amendment in the first place, or whether recklessly creating a situation that requires deadly force can itself violate the Fourth Amendment. On this record, the officers plainly did not violate any clearly established law.”
- ❖ Court reiterated what it has previously said: Qualified Immunity protects “all but the plainly incompetent or those who knowingly violate the law.”
- ❖ Court cautioned, again, that lower courts should not define clearly established law at too high a level of generality.
- ❖ “[A] rule’s contours must be so well defined that it is clear to a reasonable officer that his conduct was unlawful in the situation he confronted.”

© 2022 Hinshaw &amp; Culbertson LLP

HINSHAW

### State Qualified Immunity

- ❖ Most states have their own qualified immunity doctrines which apply to state law claims.
- ❖ Since George Floyd, at least 35 state qualified-immunity reform bills have died in state legislatures.
- ❖ Since 2020, 7 qualified-immunity bills became law in the states.
  - Only Colorado completely barred the legal defense for officers.
  - Iowa actually strengthened qualified-immunity rights for its officers.

© 2022 Hinshaw &amp; Culbertson LLP

HINSHAW

### State Qualified Immunity Applies to State Claims

- ❖ Federal qualified immunity doctrine will continue to govern claims brought under federal law, i.e., pursuant to Section 1983.
- ❖ Supremacy Clause – The states do not have the power to abolish the federal doctrine.
- ❖ Several states also have tort immunity provisions, many of which require plaintiffs to establish that the conduct by officers was willful and wanton (i.e., reckless or deliberately indifferent) before liability will attach.

© 2022 Hinshaw &amp; Culbertson LLP

HINSHAW

### Police Chase Cases

- ❖ As recently as 2015, in *Mullenix v. Luna*, 577 U.S. 7, the Supreme Court reiterated that it has never found the use of deadly force in connection with a dangerous car chase to violate the 4<sup>th</sup> Amendment, let alone be a basis for denying qualified immunity.
- ❖ Police officer (Mullenix) fired at a speeding motorist from an overpass at a time when he reasonably understood the decedent to be a fugitive fleeing from arrest, at speeds over 100 mph, who was armed and possibly intoxicated, who had threatened to kill any officer he saw if the police did not abandon their pursuit, and was racing toward another officer’s position.

© 2022 Hinshaw &amp; Culbertson LLP

HINSHAW

### Police Chase Cases, Cont.

- ❖ In *Mullenix*, qualified immunity was granted because, as the Supreme Court said, it protects actions in the “hazy border between excessive and acceptable force.”
- ❖ *Scott v. Harris*, 550 U.S. 372 (2007) – High speed chase caught on video that ended with a car crash that left the 19-year old driver a quadriplegic.
- ❖ Supreme Court held the officer did not violate the 4<sup>th</sup> Amendment by ramming the car of the fugitive whose reckless driving “posed an actual and imminent threat to the lives of pedestrians who might have been present, to other civilian motorists, and to the officers involved in the chase.”

© 2022 Hinshaw &amp; Culbertson LLP

HINSHAW

### Police Chase Bystander Cases

- ❖ In 1998, in a 9-0 ruling in *County of Sacramento v. Lewis* (523 U.S. 833), the Supreme Court held that high-speed police chases resulting in death, due to “deliberate or reckless indifference to life,” do not violate substantive due process rights **unless the officer intended to cause harm unrelated to the legitimate object of the arrest.**
- ❖ That case involved a suit filed by the parents of a California teenager who died when he fell from a motorcycle being chased by police at speeds up to 100 mph.
- ❖ Since then, the 8<sup>th</sup> and 9<sup>th</sup> Circuits have followed a strict “intent to harm” standard in all cases involving police high-speed driving.

© 2022 Hinshaw &amp; Culbertson LLP

HINSHAW

## Police Chase Bystander Cases, Cont.

- ❖ The 3<sup>rd</sup>, 4<sup>th</sup>, 7<sup>th</sup>, and 10<sup>th</sup> Circuits inquire into the specific circumstances of each case to determine whether the officer had an opportunity to deliberate and whether the emergency justified driving – essentially a deliberate indifference standard.
- ❖ *Braun v. Burke* (8<sup>th</sup> Circuit 2020) – Officer drove cruiser for approximately 5 minutes at average speed of 90 mph, passed 60 other vehicles, with no lights or siren, before colliding with a bystander's vehicle at 98 mph, killing both occupants. Officer claimed he was seeking an SUV he had seen speeding earlier.

© 2022 Hinshaw &amp; Culbertson LLP

HINSHAW

## *Braun v. Burke*, cont.

- ❖ District court dismissed the case in reliance on the intent-to-harm standard, holding there was no due process violation because there was no evidence the officer intended to harm anyone.
- ❖ The 8<sup>th</sup> Circuit agreed, holding that the intent-to-harm standard was proper and declined to consider whether an objective emergency was present, or whether actual deliberation occurred.
- ❖ **Beware of state law claims!!**

© 2022 Hinshaw &amp; Culbertson LLP

HINSHAW

## Monell Liability Under Section 1983

© 2022 Hinshaw &amp; Culbertson LLP

## Monell

- ❖ *Monell v. Dept. of Soc. Servs.*, 436 U.S. 658 (1978)
  - Held that local governments are a "person" for purposes of § 1983
- ❖ Overruled *Monroe v. Pape*, 365 U.S. 167 (1961)
  - Held that local governments are wholly immune from suit under § 1983

© 2022 Hinshaw &amp; Culbertson LLP

HINSHAW

## Trends

- ❖ Almost always included as a claim
- ❖ Courts are less likely to dismiss
- ❖ Courts allowing more discovery
- ❖ Calls for doctrinal and/or procedural reform

© 2022 Hinshaw &amp; Culbertson LLP

HINSHAW

## No Vicarious Liability

- ❖ Municipal entities should not be found liable merely because it employed the constitutional wrongdoer
- ❖ A municipality can be held liable under § 1983 only for its own violations of federal law

© 2022 Hinshaw &amp; Culbertson LLP

HINSHAW

## 11<sup>th</sup> Amendment

- ❖ 11<sup>th</sup> Amendment prevents states from being sued in federal court
  - Does not extend to municipalities
  - State officials sued in their official capacities cannot be sued for damages or other retroactive relief
  - State officials and local officials may be sued in their personal capacity
    - *Hafer v. Melo*, 502 U.S. 21, 112 S.Ct. 358 (1991)

© 2022 Hinshaw &amp; Culbertson LLP

HINSHAW

## Requirements

1. Underlying constitutional violation
2. Policy or custom established
3. That policy or custom must be the “moving force” behind the underlying constitutional violation

© 2022 Hinshaw &amp; Culbertson LLP

HINSHAW

## Underlying Violation

- ❖ Plaintiffs cannot prevail on a *Monell* claim without first establishing an underlying constitutional violation
- ❖ Exception:
  - Qualified Immunity
  - Affirmative Defenses



© 2022 Hinshaw &amp; Culbertson LLP

HINSHAW

## Policy or Custom

- ❖ Plaintiffs must prove that a “custom, policy or practice” of the municipality caused their injury
- ❖ Three main routes to liability:
  - Explicit policy
  - Widespread practice
  - Person with “final decision-making authority”

© 2022 Hinshaw &amp; Culbertson LLP

HINSHAW

## Express Policy

- ❖ Applies where an official municipal policy explicitly violates a constitutional right when enforced
- ❖ Ordinances, regulations and statutes
- ❖ Examples:
  - Throwing away prescription medications
  - Use of force



© 2022 Hinshaw &amp; Culbertson LLP

HINSHAW

## Omissions

- Requires more evidence than a single incident to establish liability
  - This is because it is necessary to understand what the omission means
  - Same requirements as widespread practice or custom claim
- No government has, or could have, policies about virtually everything that might happen
- Examples:
  - Review of 911 Call
  - Screening



© 2022 Hinshaw &amp; Culbertson LLP

HINSHAW

## Widespread Practice or Custom

- ❖ Although not authorized by written law or express municipal policy, is "so permanent and well settled as to constitute a custom or usage with the force of law"
- ❖ As in the cases attacking gaps in express policies, what is needed is evidence that there is a true municipal policy at issue, not a random event
- ❖ Examples:
  - Code of silence
  - Search warrants – knock and announce
  - Improperly suggestive photo arrays
  - Disregarding exculpatory evidence
  - Fabricating or concealing material information
  - Excessive force
  - Failing to corroborate or investigate information provide by informants

© 2022 Hinshaw &amp; Culbertson LLP

HINSHAW

## Failure to Train / Hire / Retain / Discipline

- ❖ May rise to the level of an official government policy
- ❖ To satisfy the statute, a municipality's failure to train its employees in a relevant respect must amount to "deliberate indifference to the rights of persons with whom the employees come into contact"
- ❖ Deliberate indifference is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action
- ❖ *Connick v. Thompson*, 563 U.S. 51 (2011)

© 2022 Hinshaw &amp; Culbertson LLP

HINSHAW

## Final Decision-Maker



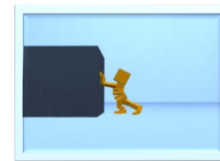
- ❖ Only those municipal officials who have "final policymaking authority" may by their actions subject the government to liability
  - Question of state law. *St. Louis v. Praprotnik*, 485 U.S. 112, 123 (1988)
- ❖ Challenged action must have been taken pursuant to a policy adopted by the official or officials responsible under state law for making policy in that area of the city's business
- ❖ Examples:
  - City Council
  - Police Chief

© 2022 Hinshaw &amp; Culbertson LLP

HINSHAW

## Moving Force

- ❖ Courts look at "whether the complaint alleges a direct causal link between a policy or custom of the [municipality] and the alleged constitutional violations"



© 2022 Hinshaw &amp; Culbertson LLP

HINSHAW

## No Qualified Immunity

- ❖ Municipalities cannot make use of the qualified immunity defense
- ❖ They can be held liable even if they did not know they were violating the victim's constitutional rights
- ❖ *Owen v. City of Independence*, 445 U.S. 622 (1980)

© 2022 Hinshaw &amp; Culbertson LLP

HINSHAW

## Punitive Damages

- ❖ Municipalities immune from awards of punitive damages under Section 1983
- ❖ *City of Newport v. Fact Concerts, Inc.*, 43 U.S. 247 (1981).

© 2022 Hinshaw &amp; Culbertson LLP

HINSHAW



## Statute of Limitations

- ❖ Same as the underlying constitutional violation

© 2022 Hinshaw &amp; Culbertson LLP



## Motion to Bifurcate

- ❖ Rule 42
- ❖ Reasons:
  - Best serves the interests of minimizing the complexity and burdens of litigation
  - Best serves the interests of judicial economy
  - Eliminating the risk of unfair prejudice against the parties
  - Will not prejudice Plaintiff's recovery of any compensatory damages

© 2022 Hinshaw &amp; Culbertson LLP



## Discovery

- ❖ Common Objections
  - Time limits
  - Subject matter limits
- ❖ Depositions
  - Apex Doctrine
  - 30(b)(6) Witnesses
- ❖ Confidentiality Order

© 2022 Hinshaw &amp; Culbertson LLP



## Thank You

Vincent Rizzo - (312) 704-3234 - [vrizzo@hinshawlaw.com](mailto:vrizzo@hinshawlaw.com)

Michael lasparro - (815) 490-4945 - [miasparro@hinshawlaw.com](mailto:miasparro@hinshawlaw.com)

